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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1031

R. W. BROOKS, ET AL.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA AND C. A. FIRTH.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above case on March 10, 1941, affirming a judgment of the United States District Court for the District of Arizona.

Opinion Below.

The opinion of the Circuit Court of Appeals is not reported but is in the record, pages 290-318. The Judge of the District Court did not deliver an opinion.

Jurisdiction.

The judgment of the Circuit Court of Appeals now sought to be reversed was entered on March 10, 1941 (R. 290-318). The jurisdiction of this Court is invoked under Section 240

(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936-938).

Question Presented.

Appellee Firth filed his petition (R. 46) for a rule on petitioners and other defendants, New Mexico water users, to show cause why they should not be punished for contempt of a consent decree and orders of the United States District Court for the District of Arizona entered in an action brought by the United States to quiet title to water rights on the Gila River in Arizona and those of petitioners on the same river in New Mexico. By its order the court levied an assessment on lands of petitioners in New Mexico to pay Firth for his services as water commissioner appointed by the court to enforce the decree and distribute the waters of the Gila River to the owners of water rights in New Mexico and Arizona according to their respective priorities as determined by said decree.

The Water Commissioner had the right to institute this proceeding to protect his pecuniary interest in the decree. The petitioners were prosecuted, not because they deprived lower appropriators of water in defiance of the decree, but because they did not pay Firth and used the water without paying him (R. 251).

Petitioners were found guilty of civil contempt and fined $100.00 each, said fine to be paid to Firth (R. 146).

The questions presented are:

I.

Whether the United States District Court for the District of Arizona had jurisdiction of an action to quiet title to water rights in New Mexico.

II.

Whether the decree of the United States District Court for Arizona quieting title to water rights in New Mexico affects the title to such water rights in the latter State.

III.

Whether the United States District Court for Arizona has jurisdiction to directly control the Gila River, canals, and headgates on the river in New Mexico.

IV.

Whether the State of New Mexico is an indispensable party to the enforcement of a decree of the United States District Court for Arizona which required acts to be performed in New Mexico where the State of New Mexico prevented the enforcement of such acts.

V.

Whether a corporation which has been dissolved can be adjudged guilty of contempt of court for violation of a decree rendered after its dissolution.

VI.

Whether the United States District Court for Arizona had jurisdiction of directors of a corporation by service of its process upon them in New Mexico.

VII.

Whether a decree quieting title to water and enjoining upper appropriators from taking the water is violated by the upper appropriators taking water which would not have reached the lower appropriators and could not have been applied to beneficial use by the lower appropriators.

VIII.

Whether impossibility of performance of a decree is not a defense to a charge of violation of such decree and an injunction issued therein.

IX.

The court erred in deciding that the petitioners had violated the decree and order of the court.

X.

The decision of the lower court affirming a judgment imposing a fine upon each petitioner of $100.00 for the use of Water Commissioner Firth is in conflict with analogous decisions of other circuit courts because said fine was not limited to the amount of expenses and damage caused Firth by the disobedience of the orders of the court, and was arbitrary and punitive.

Statement.

Appellee Firth by his petition (R. 46) alleged that he had been appointed Water Commissioner by the court to enforce the decree and orders of the court, and that there had been levied on the lands of the defendants in the original action an assessment on each acre of land upon which they had a water right, as shown by the decree, to pay him his salary and expenses as such Water Commissioner.

That upon the failure of defendants to pay said assessments Firth was directed by said order to refuse delivery of water to any party entitled to divert so long as such user remained in default.

That on January 1, 1939, the defendants, water right owners in New Mexico, were in default and on that day Firth locked the gates on the canals in New Mexico carrying water to said land owners and notified them not to use water from the river until the assessments had been paid.

On January 4, 1939, the State Engineer of New Mexico, acting under orders of the Governor of the State of New Mexico, ousted Firth from possession of the river and canals of New Mexico and proceeded to administer the waters of said river without regard to said decree and that the said defendants, and among them these petitioners, used said water in violation of said decree.

Appellee alleged upon information and belief that the State Engineer and his subordinates were acting as agents of the New Mexico defendants.

The original action was brought by the United States in the United States District Court of Arizona against the claimants of water rights on that part of the Gila River as it flows between a line ten miles east of the parallel to the boundary of New Mexico and Arizona and the junction of the river with Salt River in Arizona to quiet title of said parties to said water rights on said stream (R. 23).

A court decree was entered in the cause upon the written stipulation of the parties. The court reserved jurisdiction to appoint a water commissioner to enforce the decree, to fix his compensation and the manner of payment, and directed the Commissioner to deny any defendant the right to use the waters in case of his failure or refusal to obey the orders of the court. The decree perpetually enjoined the defendants and their heirs, assigns, and successors in interest from making any claim to or diverting said waters except as specified in the decree.

As shown by the contempt judgment (R. 145-146) thirty-two defendants were fined. Originally there were seventy-two defendant appropriators irrigating lands in that part of the river in New Mexico covered by the decree (R. 47-48).

The petitioners offered to prove that half of the defendants had either died or had leased or sold their lands and were not before the court in the contempt proceedings (R.

175). The petitioners offered to prove that the water taken from the river by petitioners was necessary to save their crops and by reason of the physical character of the stream bed if said water had not been taken it would not have benefited the lower users (R. 173-174).

The Governor of New Mexico directed the State police to cause Firth to desist from administering the waters of the river and put the State Engineer in full possession of the facilities of administering the waters of the same (R. 94).

The court fined each of the petitioners the sum of $100.00 for the use of Firth to pay expenses incurred by him in prosecuting petitioners and for such other expenses as he might incur in the administration of the decree (R. 146).

Reasons for Granting the Writ.

I.

The decision of the lower court that the United States District Court for the District of Arizona had jurisdiction to quiet title to water rights in New Mexico is in conflict with a decision of the United States Circuit Court of Appeals for the Tenth Circuit.

The lower court in its opinion said (R. 291-292):

> "Without going into detail as to the terms of the decree it is sufficient for the purposes of this case to say that it determines the rights of all the water users in and to the waters of the Gila River within the state of New Mexico and within the state of Arizona with great detail and enjoins each of the parties from interfering with the water rights of the other parties to the decree, as therein determined.
>
> * * * * * * *
>
> "It is uniformly held that an action to determine such rights is not a transitory action. Consequently a court would be limited to the determination of such water rights and only such water rights as are located within

its territorial jurisdiction. The difficulty in applying the ordinary rule as to jurisdiction is that the determination of water rights in the case of an interstate stream would often be entirely inconclusive and might be wholly futile unless the amount of water which should enter the state is also fixed and determined."

The United States Circuit Court of Appeals for the Tenth Circuit in *Albion-Idaho Land Company* v. *Naf Irrigation Co.*, 97 F. (2d) 439, said at page 444:

> "A suit to adjudicate water rights is a local action. The Hart decree undertook to adjudicate water rights beyond the jurisdiction of the court and was void on its face." Citing *Rickey Land and Cattle Co.* v. *Miller and Lux* (9 Cir.) 152 Fed. 11, 14, 15, affirmed 218 U. S. 258.

The same court further said:

> "The trial court did not undertake and indeed had no jurisdiction to adjudicate the several priorities of the users on the stream, since the points of diversion and the lands irrigated from the stream of the lower group are situated in the State of Idaho and beyond the territorial jurisdiction of the court." Citing 28 U. S. C. A. Secs. 113-166; *Vineyard Land & Stock Co.* v. *Twin-Falls S. R. L. & W. Co.* (9 Cir.) 245 Fed. 9, 25, 26; *North Indiana R. R. Co.* v. *Michigan Central R. R. Co.*, 56 U. S. 233; *Matarazzo* v. *Hustis* (D. C. N. Y.) 256 Fed. 882, 886; *Massie* v. *Watts*, 10 U. S. 148, and Federal cases above cited.

The Circuit Court of Appeals in the instant case endeavors to reconcile its decision with the decision of the Tenth Circuit Court of Appeals in the *Albion* case. Such reconciliation is impossible. In the *Albion* case the court said (p. 445):

> "The sole province of the trial court was to divide the waters between the users in the state of Utah and

> the users in the state of Idaho, and leave the division of the waters among the several users in the upper group to the state court decree to which they were parties and among the several users in the lower group to the federal court decree to which they were parties."

In the *Albion* case the water users in the lower State, Idaho, filed their suit in the upper State, Utah, for an injunction not to quiet title but to restrain the commission of a tort in the upper State where the United States District Court in the upper State had jurisdiction of both the rem and the person of the defendants within that territorial jurisdiction, and the court examined the decrees theretofore entered in the two States establishing priorities and ordered the defendants in the upper State, Utah, not to use more than a certain amount of water and to permit a definite amount of water to pass over the State line into the lower State; but did not quiet title or attempt to say what individual water users beyond its territorial jurisdiction owned or limit their individual use.

The interpretation by the Tenth Circuit Court of the *Miller and Lux-Rickey* case is supported by all the text writers of this country on water rights. See 1 Wiel on *Water Rights in Western States* (3d Ed.) Secs. 344-345, pp. 371-373; Long on *Irrigation*, Sec. 273, pp. 471-472. To the same effect regarding jurisdiction of the res, sec 21 *C. J. S.* p. 53; 14 *Am. Juris.* p. 430, Sec. 238; Beale on *Conflict of Laws*, Vol. 1, p. 425.

The Circuit Court below said (R. 292),

> "The difficulty in applying the ordinary rule as to jurisdiction is that the determination of water rights in the case of an interstate stream would often be entirely inconclusive and might be wholly futile unless the amount of water which should enter the state is also fixed and determined."

as the reason for exercising jurisdiction to quiet title in New Mexico.

The Supreme Court of the United States alone has original and exclusive jurisdiction to determine the equitable apportionment of water between states. If the reasoning of the circuit court in the instant case is sound, a suit might be instituted in the United States District Court at Galveston, Texas, to quiet title to water rights in the upper reaches of the Rio Grande in Colorado, a thousand miles away.

The unsoundness of this view is pointed out by the court in *Van Horst* v. *Thompson,* 18 F. 2d 177, by the District Court of Columbia Appeals:

> "The Iowa court would have had no jurisdiction whatever to quiet the title in the plaintiff there to land here, if her petition had asked for that relief, and any decree of that court so attempting would have been innocuous. When that suit was brought, the plaintiff could not know whether or not the defendants would appear, unless there was a prior agreement between the parties to that effect, which is not claimed."
>
> "Water rights are real property." Citing 2 Kinney on *Irrigation and Water Rights* (2d Ed.) p. 238. *New Mexico Products Co.* v. *New Mexico Power Co.* 42 N. M. 311, 77 Pac. (2) 634.

The Lower court, however, held that jurisdiction of the res in New Mexico was conferred on the court by the consent of the defendants.

II.

The decision of the lower court that the decree affects title to water rights in New Mexico appears to be in conflict with analogous decision of this Court.

The lower court held (R. 308):

> "The injunction in the case at bar was not only directed to the individual defendants but to their successors in interest and such successors are guilty of contempt in violating the injunction. The trial court having power to decide the relative rights of the liti-

> gants in New Mexico and Arizona, as we hold, was also capable of enforcing its decree against such parties and their successors whether or not the decree be regarded as one strictly or quasi in rem or in personam as to them."

It appears that the decision of the lower court is in conflict with this Court in *Fall* v. *Eastin*, 215 U. S. 1, 11. The lower court held that the decree (R. 308) was binding upon defendants' successors in interest in the water rights in New Mexico. In *Fall* v. *Eastin* this Court declared that a "court not having jurisdiction of the res cannot affect it by its decree."

The decision in this case gives the decree by its own force the effect of constructive notice to innocent purchasers that the water rights are subject to the control of the United States District Court for the District of Arizona.

III.

The decision of the lower court that the United States District Court for Arizona has jurisdiction to directly control the Gila River, canals, and headgates in New Mexico is in conflict with analogous decisions of this Court.

It appears that the decision of the lower court is in conflict with the decision of this Court in *Carpenter* v. *Strange*, 141 U. S. 87, 106, and other decisions relied on by the court in that case. The decree and orders of the court directed the Commissioner to go into the State of New Mexico and take charge and control of the diversion and distribution of the waters of the Gila River (Appendix paragraphs XII, XIII, of the decree, pp. 25-27). The decree does not enforce its provisions with respect to the diversion and distribution of the waters of the Gila River in New Mexico by coercion of defendants, but by and through the Water Commissioner.

It is respectfully submitted that the lower court does not successfully avoid the effect of the decree by saying that (R. 315):

> "The water commissioner appointed by the court at the instance of the appellants, if we regard him as agent of the appellants, as he must be regarded, is clearly entitled to enter the State of New Mexico and to carry on operations of his agency so long as he violates no state statute. If the state in the exercise of the police power has enacted laws to control the manner of the diversion of water it would be his duty to conform to those laws."

The lower court holds that if the petitioners prevented Firth from carrying on "operations of his agency in New Mexico," they were guilty of civil contempt. The lower court found (R. 143):

> "That * * * the respondents * * * have violated the terms of the said decree and orders of court made pursuant thereto; that they have held in contempt the decree and the injunction therein contained, the orders and officer of this court and that judgment should be entered herein finding and adjudging said respondents, and each of them, guilty of contempt."

IV.

In a decree rendered by the United States District Court for the District of Arizona where there were acts necessary to be performed in New Mexico for the enforcement of such decree and the performance of which acts required the assent of New Mexico, and where the latter State prevented the performance of such acts, it became an indispensable party without whose presence said decree could not be enforced in New Mexico.

The Governor of the State of New Mexico ordered the Chief of the State Police to oust the Water Commissioner

from control of the waters of the Gila River of New Mexico and place the same in the custody of the New Mexico State Engineer (R. 225).

This Court in *Rickey Land and Cattle Company* v. *Miller and Lux, supra,* said:

> "It is true that the acts necessary to enforce it (the decree) must be done in California, and require the assent of that state so far as this court does not decide that they may be demanded as in consequence of whatever right, if any, it may attribute to Nevada." *Bean* v. *Morris,* 221 U. S. 485.

If the assent of New Mexico is required so that the decree may be enforced in New Mexico, then whether or not it may be required was beyond the jurisdiction of the lower court to decide. The court could not presume that the State had given its assent.

The rights of New Mexico in the waters of the Gila River are not limited by the strict application of the legal principle of appropriation. *New Jersey* v. *New York,* 283 U. S. 335. See also "*Conflicting Interests of States Over Interstate Waters,*" by Chas. N. Burch in Vol. X, No. 4, *Tennessee Law Review.* Mr. Burch was the master appointed by this Court in *New Jersey* v. *New York, supra.*

V.

The Circuit Court's decision that the Sunset Canal Company and the Sunset Ditch Company were legal entities is in conflict with analogous decisions of this Court.

The trial court found (R. 131) that the Sunset Ditch Company was incorporated in New Mexico in 1903 and that at the time of filing the complaint in the original suit the Sunset Ditch Company was and still is a corporation doing business in Arizona and New Mexico under the name of Sunset Canal Company, defendant in the original action and re-

spondent in this proceeding, and that the two companies are identical.

The record shows that the Sunset Ditch Company was dissolved on June 14, 1920 (R. 219), prior to the filing of the complaint and entry of the consent decree in the original proceeding.

It is not claimed that the Sunset Canal Company existed independently of the Sunset Ditch Company.

The Circuit Court said in its opinion (R. 313):

> "The Court found that the diversion ditches were operated by the Sunset Canal Company and the appellants were acting by and through such Canal Company in taking and receiving the water diverted from the Gila River and that they were responsible for the violation of the order of the court and were, therefore, guilty of contempt of court. The appellants were diverting the water from the Gila River and in so doing were operating in the name of the Canal Company."

The dissolution of the Sunset Ditch Company "cannot be distinguished from the death of a natural person in its effects." *Oklahoma Natural Gas Company* v. *Oklahoma*, 273 U. S. 634.

VI.

The Court below erred in denying the motion to quash service in New Mexico upon Parley P. Jones, C. W. Brooks, and Rachel Jensen as Directors of the Sunset Canal Company of the rule to show cause issued out of the United States District Court of Arizona.

The petitioners, Parley P. Jones, R. W. Brooks, and Rachel Jensen were defendants in the original action. In this proceeding they were made respondents individually and as directors of the Sunset Canal Company (R. 73). They were served in New Mexico by the United States

Marshal of New Mexico individually and as directors of the Sunset Canal Company (R. 68-69). The court below overruled their motion to quash service upon them as directors (R. 129). The Circuit Court of Appeals affirmed this ruling on the ground that as they were defendants in the original suit they were only entitled to notice (R. 310).

It is respectfully submitted that while they were defendants individually they were not defendants as directors of the Sunset Canal Company, and that the service upon them as such directors was void.

In *Robertson* v. *Railroad Labor Board,* 268 U. S. 619, 622, this court said:

> "Under the general provisions of law, a United States district court cannot issue process beyond the limits of the district (Harkness v. Hyde, 98 U. S. 476, 25 L. ed. 237; Ex parte Graham, 3 Wash. C. C. 456, Fed. Cas. No. 5,657); and a defendant in a civil suit can be subjected to its jurisdiction in personam only by service within the district (Toland v. Sprague, 12 Pet. 300, 330, 9 L. ed. 1093, 1105). Such was the general rule established by the Judiciary Act of September 24, 1789, Chap. 20, §11, 1 Stat. at L. 73, 79, Comp. Stat. §1033, in accordance with the practice at the common law."

VII.

The Circuit Court's decision affirming the ruling of the Trial Court denying petitioners' offer to show that the water used by them, which use is alleged to have been in contempt of Court, if it had not been so used would not have benefited lower appropriators is in conflict with an analogous decision of this Court.

The Circuit Court said (R. 315):

> "The fact is that the appellants, as a result of the action of the officers of the State purporting to act for

> the State, but really acting for them, took more water from the Gila River than they were entitled to under the terms of the decree and used it on their land with full knowledge that to do so was to violate the decree."

Petitioners offered to show that owing to the physical condition of the stream bed, the water of the Gila River used by them, if permitted to flow down stream, would not have benefited the lower appropriators. This offer was denied (R. 171-174).

The ruling was in conflict with the decisions of this Court in *Washington* v. *Oregon*,, 297 U. S. 517-523, and the United States Circuit Court of Appeals for the Tenth Circuit in *Albion-Idaho Land Company* v. *Naf Irrigation Co.*, 97 F. 2d 439-444.

Mr. Wiel in *Water Rights in Western States*, at page 708, states:

> "The modern rule is to regard injunctions granted to appropriators as based strictly upon beneficial use and as not restraining a defendant while the plaintiff is not himself using the water, even if the decree does not (as it should) expressly so declare." Citing cases.

VIII.

The court erred in refusing to permit appellants to prove that the court's order and decree were physically impossible of enforcement in New Mexico because one-half of the water rights adjudicated by said decree are now owned and operated by persons who are not parties to this suit.

The trial judge refused to permit petitioners to show that the title to one-half of the lands and water rights described in and adjudicated by the decree had passed into the hands of innocent purchasers who were not defendants to the original action or respondents named by Firth in his original petition (R. 175-176).

As a result of this change of ownership the decree and orders of the court were unenforceable because the lands of both the petitioners and said purchasers are served by the same canal, and that it is impossible to divert and distribute the waters during the irrigation season to the petitioners in the manner provided in the decree and orders of the court when at the same time the other water users not subject to the decree would exercise their rights to divert and use the water according to their New Mexico appropriations.

IX.

The court erred in deciding that petitioners had violated the decree and order of the court.

Firth instituted this suit to enforce an order made for his benefit. The order provides (R. 58-59):

> "It is further ordered that all expenses of the Water Commissioner herein authorized shall be paid by the land owners and for that purpose the Water Commissioner is authorized and directed to collect 13¢ for each acre of land for which a water right is given in the decree. The Water Commissioner is further directed to collect said 13¢ per acre from each individual, corporation, or party designated in the decree as the party entitled to divert water from the Gila River under the terms thereof. * * *
>
> * * * * * * *
>
> "The Water Commissioner is ordered and directed to refuse the delivery of water from the Gila River to any party entitled to divert so long as such diverter remains in default in the payment of any of its share of the said 13¢ per acre."

The petitioners were not diverters. The right to divert was granted to the Sunset Canal Company (Appendix, paragraphs V and VIII, pp. 23-25, nor did the petitioners

divert water from the Gila River. It was diverted by the State of New Mexico (R. 53-54).

Firth did not make demand on petitioners for the payment of the acreage assessment (R. 204). He ordered the petitioners to quit using the water, but the court had not authorized him to do more than to refuse to deliver water to the diverters in default.

The Circuit Court in its opinion states (R. 312) that "the parties were enjoined from using any water while in default." We fail to find authority for this statement in the decree or order. The pertinent provisions of the decree are set out in the Appendix to this petition (Appendix, Decree, paragraphs XII and XIII, pp. 25-27; the order is set out at pages 57-60 of the record.

As long as the Water Commissioner was in control of the diversion of the water he could cut it off. He needed no further delegation of power to collect from the diverter. The order did not provide for the situation brought about by the State of New Mexico in ousting the Water Commissioner and putting its water master in control of the river.

In the case of *In re Probst* (2 Cir.), 205 Fed. 512-513), the court said:

> "Our attention has been called to no writ, process, order, rule, decree, or command of the court which he has disobeyed. * * * This may be a highly technical ruling; but where Congress has been so industrious to restrict the natural inherent powers of a federal court, scrupulous attention to the limitations it has imposed would seem to be the proper course."

The same court in *Berry* v. *Midtown* (2 Cir.), 104 F. (2d) 107-111, said:

> "Before a person should be subject to punishment for violating a command of the court, the order should inform him in definite terms as to the duties thereby

> imposed upon him. Once we adopt the principle that an express order to one party carries implications of duties imposed upon the other, it would be difficult to set limits upon the doctrine. We believe it is a wiser policy to punish as contempt only the disobedience of some express command; and such we understand to be the general rule."

Quoting from *Probst* case, *supra,* the court in *Morgan* v. *United States* (8 Cir.), 95 F. (2d) 830-836, said:

> "That we are in accord with the quoted declaration of the court, as to our duty to pay scrupulous attention to the limitation imposed by Congress upon the power of the court to punish for contempt, appears from the following expression of this court in Wilson *v.* United States, 8 Cir. 25 F. (2d) 215, 218: 'Section 385 is a limitation on the power of the inferior federal courts to punish for contempt, Ex parte Robinson, 19 Wall. 505, 22 L. ed. 205; and the power must be exercised within the restrictions therein named.' "

Firth was ordered to collect from the diverter, the Sunset Canal Company, and if the Canal Company defaulted he was directed to refuse to deliver the water it to.

There is no charge or proof of a conspiracy to violate the decree or orders, or that petitioners aided or abetted the violation of the decree, much less is there evidence thereof.

There is no evidence connecting any of the petitioners except Jones with any acts done by the New Mexico officer. The most that can be said is that the petitioners used the water as and when the New Mexico water master delivered it to them.

This proceeding was not prosecuted by the United States or other lower appropriators on the river. It was not alleged that they were damaged, nor did the court find that they were damaged.

Even if the petitioners had paid their individual assessments, there was no assurance that the other water users would pay theirs, and until all paid the Water Commissioner was directed by the decree to refuse to deliver water to the diverter, which, in this case, was the Sunset Canal Company (R. 59).

X.

The decision of the lower court affirming a judgment imposing a fine upon each petitioner of $100 for the use of Water Commissioner Firth is in conflict with analogous decisions of other Circuit Courts because said fine was not limited to the amount of expenses and damage caused Firth by the disobedience of the orders of the court, and was arbitrary and punitive.

The court fined the petitioners $100 each to be paid the Clerk of the court for the "use of said Water Commissioner, C. A. Firth, to be used by him to pay the extraordinary expenses incurred by him in the preparation for and prosecution of respondents in these proceedings; and for such other expenses as the Water Commissioner now has, or may, incur in the administration of said decree" (R. 146).

This clearly classifies this proceeding as a civil contempt. *McCrone* v. *United States*, 307 U. S. 61-64.

The recovery thus granted Firth amounted to $3,200 or $100 from each of the thirty-two petitioners fined (R. 145-6). The Circuit Court found that the Water Commissioner had been put to an expense of $1,596.55 (R. 317). The only proof of this item is found in a voluminous report of the Commissioner Firth received in evidence over the objection of the petitioners that no opportunity was offered to cross-examine as to contents of said report (R. 203).

When the court announced that he would fine each of the petitioners in the sum of $100, they objected to the amount of the proposed fines because they were not based on any evidence showing that amount of expenses or damage had been incurred by Firth by reason of the petitioners' disobedience to the orders of the court, and because the fines were arbitrary and punitive, and not remedial (R. 246-7).

The Circuit Court of Appeals said (R. 316):

> "The true rule is that the matter of fine is largely a matter of discretion * * *"

This decision of the court is in conflict with the decisions in *Christensen Engineering Co.* v. *Westinghouse Air Brake Co.* (2 Cir.) 135 Fed. 774-782; *Norstrom* v. *Wahl* (6 Cir.) 41 F. 2d 910, 913; *Rivers* v. *Miller* (5 Cir.) 112 F. 2d. 439-443, and *Krentler-Arnold Hinge Last Co.* v. *Leman* (1 Cir.) 50 F. 2d 699.

In *Rivers* v. *Miller, supra,* the United States Circuit Court of Appeals for the Fifth Circuit said:

> "The difference between a civil, as distinguished from a criminal, contempt proceeding, is that the civil contempt is brought for the protection of plaintiff in the rights given him by the order, including reparation or indemnity as to losses suffered through its disobedience. Leman *v.* Krentler-Arnold Co., 284 U. S. 448; Gompers *v.* Buck's Stove & Range Co., 221 U. S. 148. In such a proceeding the court, as part of its order, may fine or otherwise charge the defendant with the expenses and damages caused to plaintiff by the disobedience of the order which constitutes the contempt. Leman *v.* Krentler-Arnold Co., supra; Worden *v.* Searls, 121 U. S. 14, 27; Vilter Mfg. Co. *v.* Humphrey, 132 Wis. 587, 112 N. W. 1095, 13 L. R. A., N. S., 591; State *v.* Northshore Boom Co., 67 Wash. 317, 121 P. 467, Ann. Cas. 1913 D, 456, p. 457; Root *v.* McDonald, 260 Mass. 344, 157 N. E. 684, 54 A. L. R. 1422."

Importance of the Case.

This case is of great importance to all irrigation states traversed by interstate streams, except those in which the rights to the waters of such stream have been settled by original proceedings in this Court or by compacts between the States.

It is of the utmost public importance that this Court determine whether the decision of the lower court in the following particulars is to be the law of all of the irrigation States:

> That although water rights are real property the rule that a court has no jurisdiction over real property outside its territorial jurisdiction does not apply to water rights on interstate streams.
>
> That a court can directly control the water of an interstate stream and canals and ditches thereon outside its territorial jurisdiction.
>
> That a decree is an action to quiet title to water rights on an interstate stream runs with the title to the water rights beyond the territorial jurisdiction of the court rendering the decree.
>
> That a decree is an action to quiet title to waters of an interstate stream can operate by its own power outside the territorial jurisdiction of the court rendering the decree.
>
> That a lower senior appropriator may prevent an upper junior appropriator from using the water which the lower senior appropriator cannot apply to beneficial use. The decision on this point is contrary to the fundamental law of appropriation that "beneficial use shall be the basis, the measure, and the limit of the right to the use of water." Sec. 3280, Revised Code, Arizona, 1928; Sec. 3, Art. XVI, Constitution of New Mexico.

Art. XVI, Constitution of New Mexico.

Also the decision appears to be in conflict with the decisions of this Court and the decisions of other Circuit

Courts of Appeals respecting the power of Federal courts to punish for civil contempt under Judicial Code, Sec. 268.

Conclusion.

It is, therefore, respectfully submitted that this petition for a writ of certiorari be granted.

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